

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Whitbeck, C.J., and Jansen and Markey, JJ.

MARY BAILEY,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL CENTER,

Defendant-Appellant,

and

SECOND INJURY FUND (VOCATIONALLY
HANDICAPPED PROVISION)

Defendant-Appellee,

and

CRAIG R. PETERSEN
INTERIM DIRECTOR OF THE WORKERS'
COMPENSATION AGENCY,

Intervenor-Appellee.

SUPREME COURT
No. 125110

COURT OF APPEALS
No. 243132

WCAC Docket
No. 01-0076

BRIEF ON APPEAL OF DEFENDANT-APPELLEE
SECOND INJURY FUND (VOCATIONALLY HANDICAPPED PROVISION)

ORAL ARGUMENT REQUESTED

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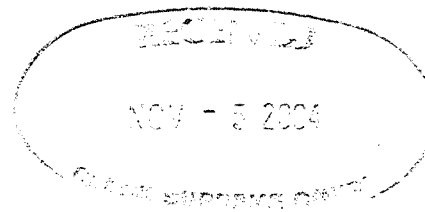


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COUNTER-STATEMENT OF QUESTION PRESENTED

The Worker's Disability Compensation Act ("WDCA") § 925(1) [MCL 418.925(1)] commands a workers' compensation carrier to notify the Second Injury Fund "[n]ot less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury" as to the likelihood that compensation may be payable more than one year after injury to a person certified as vocationally disabled. Oakwood failed to comply with its obligation to notify the Fund in this case. Did the Court of Appeals correctly hold in *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), in *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2002), and below, that an employer's or carrier's failure to comply with § 925(1)'s mandatory notice requirement requires the Fund's dismissal and forecloses Fund liability?

The Court of Appeals, below, answered, "Yes."

Plaintiff-appellee Mary Bailey answers, "No."

Defendant-appellant Oakwood Hospital and Medical Center answers, "No."

Defendant-appellee Second Injury Fund answers, "Yes."

Intervenor-appellee Workers' Compensation Agency Director answers, "Yes."

Amicus curiae Munson Hospital answers, "No."

COUNTER-STATEMENT OF FACTS

As defendant-appellant Oakwood Hospital and Medical Center's ("Oakwood") statement of facts is argumentative, defendant-appellee Second Injury Fund ("Fund") adopts the statement of facts set forth in the brief on appeal of *amicus curiae* Munson Hospital, brief of *amicus curiae* at pages 1-3, and offers the following additional facts:

In its opinion, below, the Court of Appeals held that the notice requirement of WDCA § 925(1) [MCL 418.925(1)] is mandatory, and that an employer's or carrier's non-compliance with that requirement forecloses all Fund liability under WDCA § 921 [MCL 418.921]. *Bailey v Oakwood Hospital and Medical Center and Second Injury Fund*, 259 Mich App 298, 305; 674 NW2d 160 (2003). [37a] The Court below, further held at pages 305-306 that WDCA § 921 does not limit Oakwood's benefit liability to plaintiff-appellee Mary Bailey ("Bailey"). [37a]

On July 8, 2004 this Court entered its order granting Oakwood's application for leave to appeal, *Bailey v Oakwood Hospital and Medical Center and Second Injury Fund*, 470 Mich 892; 683 NW2d 144 (2004). [44a-45a] The Court's order directs the parties to address the issue of:

[W]hether the Court of Appeals properly interpreted MCL 418.921 and MCL 418.925 in *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2001), and this case. In discussing this issue, the parties should consider the following: (1) whether the imposition of liability on the employer for paying benefits after 52 weeks of disability, in those situations where the Second Injury Fund does not receive statutory notice, is consistent with MCL 418.921's statement that the employer's liability "shall be limited" to a 52-week period and that responsibility for all later benefits "shall be the liability of the fund"; (2) whether MCL 418.925's placement of responsibility for providing notice to the Second Injury Fund on the carrier, not the employer, affects the analysis of this issue; and (3) whether the lack of a statutory remedy for a carrier's failure to provide timely notice to the Second Injury Fund affects the analysis of this issue.

The Fund files this brief on appeal contending that the Court of Appeals correctly decided both *Robinson v General Motors Corp*, 242 mICH aPP 331; 619 nw2D 411 (2000), and *Valencic*

v TPM, inc. 248 Mich App 601; 639 NW2d 846 (2002), and that the Court of Appeals opinion, below, should be affirmed on the issue of the Fund's dismissal. The Fund supports the position of intervenor-appellee Director of the Workers' Compensation Agency on the issue of Oakwood's continuing WDCA benefit liability to Bailey.

SUMMARY OF ARGUMENT

The Court of Appeals opinion below should be affirmed because *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), and *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2002), and the decision below all correctly hold that an employer's or carrier's non-compliance with WDCA § 925(1)'s notice requirement results in [1] the Fund's dismissal from a certified person's benefit claim against his or her employer, and [2] an absence of Fund reimbursement liability to the employer or carrier involved.

The holdings in *Robinson* and *Valencic* comport with fundamental rules of statutory construction. First, every word in a statute is to be given effect if possible. Second, the word "shall" in statutory language reflects mandatory rather than discretionary action. Section 925(1) of the WDCA requires a carrier to notify the Fund within a discrete period of time—"not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury"—whether workers compensation benefits may be payable more than one year after a certified person's date of injury. The notice directive is plain and is therefore mandatory.

Robinson and *Valencic* were correctly decided. While WDCA § 925(1) contains no sanction for non-compliance with its notice requirement, this Court has twice held that non-compliance with other WDCA provisions—§§ 862(1) [MCL 418.862(1)] and 862(2) [MCL 418.862(2)]—results in dismissal notwithstanding the absence of any sanction within the four corners of those provisions. See *McAvoy v H B Sherman Co*, 401 Mich 419; 258 NW2d 414 (1977), and *Garcia v McCord Gasket Corp*, 449 Mich 16; 534 NW2d 473 (1995). Both *McAvoy* and *Garcia* were predicated upon the need to avoid rendering the statutory language in question nugatory. *Robinson* relied upon similar reasoning, and this Court has very recently utilized

similar reasoning in the WDCA context, *Sweatt v Dep't of Corrections*, 468 Mich 172, 181-182; 661 NW2d 201 (2003).

Section 925(1) is a legislative limitation on the Fund's authority to reimburse benefits under § 921, as the expiration of a legislatively-specified period of time results in the expiration of the legislatively-granted power to act within that time. *Barnhart v Peabody Coal Co*, 537 US 149, 174-175; 123 S Ct 748; 154 L Ed 2d 653 (2003) (Scalia, J., dissenting). Because Oakwood failed to comply with § 925(1)'s notice requirement, which is a legislatively-imposed jurisdictional limitation, the Fund's reimbursement authority under § 921 expired.

The meaning of § 925(1) of the WDCA becomes plainer when analyzed via the textualism approach to statutory construction. Textualism seeks a statutory construction that is "most compatible with the surrounding body of law into which the provision must be integrated," *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring). In this case, the "surrounding body of law into which [WDCA § 925(1)] must be integrated" is the WDCA, which contains three other provisions imposing a notice requirement and delineating the circumstances under which non-compliance with each will be excused. Because § 925(1) of the WDCA provides no circumstance that will excuse a carrier's non-compliance, this Court should hold [1] that the Legislature did not intend to excuse non-compliance with that provision's notice requirement for any reason, and [2] that if there is to be an excuse, the Legislature must create it.

Moreover, § 931(4) of the WDCA, which authorizes the Fund to raise defenses to claims against it, must be considered. There would have been little reason for the Legislature to authorize the Fund to raise defenses if the Fund could not assert the notice defense stated in

§ 925(1) of the WDCA. When §§ 931(4) and 925(1) of the WDCA are considered together, it is readily apparent that the sanction imposed below—no Fund reimbursement to an employer or carrier failing to comply with § 925(1)—is warranted.

The concurring opinion below erroneously criticizes *Robinson* as a judicial exercise of legislative power. Because it is the duty of appellate courts "to say what the law is," they "must of necessity expound and interpret that rule," *Marbury v Madison*, 5 US 137, 177; 1 Cranch 137; 2 L Ed 60 (1803). Disagreement with *Robinson's* holding does not convert *Robinson* into judicial legislation.

Finally, the Fund submits that Oakwood's "no sanction, no consequence" argument fails in light of decisional law holding that the statutory word "shall" imposes a mandatory duty and requires a sanction for non-compliance. This Court should therefore reject Oakwood's argument. This conclusion unaffected by the imposition of the notice requirement in WDCA § 925(1) upon a carrier rather than upon an employer as Oakwood is self-insured, and is thus by definition a "carrier" pursuant to § 601 [MCL 418.601] of the WDCA.

ARGUMENT

The Court of Appeals correctly held in *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), in *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2002), and below, that an employer's or carrier's failure to comply with WDCA § 925(1)'s [MCL 418.925(1)] mandatory notice requirements requires dismissal of the Second Injury Fund. Neither the absence of a statutory remedy for non-compliance with that section and its imposition of responsibility for notice upon the carrier rather than upon the employer, nor the text of WDCA § 921, requires reversal of *Robinson*, of *Valencic* or of the opinion below. As Oakwood failed to comply with WDCA § 925(1), the Court of Appeals, below, properly dismissed the Second Injury Fund on authority of those cases.

A. Scope of review of this issue.

The proper construction of WDCA §§ 921 and 925(1) presents a legal issue reviewed *de novo* on appeal. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000).

B. Second Injury Fund's role in this case.

The Second Injury Fund, created by WDCA § 501(1) [MCL 418.501(1)], is a trust fund, *Marshall v D J Jacobetti Veterans Facility*, 447 Mich 544, 548 n 3; 526 NW2d 585 (1994).

Pursuant to WDCA § 551(1) [MCL 418.551(1)], the Fund is financed by assessments upon all employers self-insured for workers' compensation and by all insurers that write workers' compensation policies. Oakwood's requested relief would shift, to the self-insureds and insurers that finance the Fund, Oakwood's benefit liability to Bailey. As discussed below, Oakwood's position fails because it contravenes the legislatively-determined eligibility criteria for imposing liability upon the Fund for obligations to a person certified as vocationally disabled.

The Fund's involvement in this case flows from Chapter 9 of the WDCA [MCL 418.901 *et seq*], added by 1971 PA 183. Section 905 of the WDCA [MCL 418.905] authorizes an unemployed person to request certification as "vocationally disabled" if (s)he has "a medically certifiable impairment of the back or heart, or who is subject to epilepsy, or who has diabetes,

and whose impairment is a substantial obstacle to employment, considering such factors as the person's age, education, training, experience, and employment rejection." WDCA § 901(a) [MCL 418.901(a)]. If a certified person later sustains a work-related personal injury as required by WDCA § 301(1) [MCL 418.301(1)], other WDCA sections in Chapter 9 address the rights, liabilities and duties of the person's employer and of the Fund.

C. WDCA §§ 921 and 925(1): Fund's benefit liability and employer's notice obligation.

Two WDCA sections are implicated in the determination of the benefit liabilities of a certified person's employer and of the Fund. WDCA § 921 [MCL 418.921] provides:

A person certified as vocationally handicapped who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injury, the compensation shall be paid to his dependents. The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund. The fund shall be liable, from the date of injury, for those vocational rehabilitation benefits provided in section 319.¹

Section 921 imposes benefit liability upon the certified person's employer for a 52-week period following the date of the person's injury and imposes subsequent liability upon the Fund. However, § 921 does not stand alone. Section 925(1) of the WDCA [MCL 418.925(1)] requires the employer to provide the Fund notice of this benefit obligation within a specific period of time if that employer wishes to limit its liability under § 921. Section 925(1) of the WDCA provides:

¹ As originally enacted by 1971 PA 183, this section provided for a 104-week period of employer liability followed by Fund liability. The section was amended by 1985 PA 103 to provide for the current 52-week period of employer liability followed by Fund liability.

When a vocationally handicapped person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. *Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury.* The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability. [emphasis added]²

The second sentence of § 925(1) thus requires an employer to notify the Fund within a temporal "window" of approximately three to five months ["not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury"] before the end of the first year after the certified person's date of injury. The mandatory notice must state the likelihood of the certified person's entitlement to WDCA benefits beyond the end of the 52-week period.

D. WDCA § 925(1)'s notice provision is a legislative limitation on Fund's reimbursement authority under WDCA § 921.

In *Howard v General Motors Corp*, 427 Mich 358, 387; 399 NW2d 10 (1986), former Justice Brickley described §§ 833(1) [MCL 418.833(1)] and 381(2) [MCL 418.381(2)] of the WDCA—the "one year back rule" and "two year back rule" provisions, respectively³—as "legislative limitations on the scope of authority possessed by a body granting workers' compensation benefits."

Similarly, § 925(1) of the WDCA, a notice provision, is a legislative limitation on the Fund's authority under § 921 of the WDCA to reimburse an employer because that liability expires if the notice requirement is not timely met. In *Barnhart v Peabody Coal Co*, 537 US 149;

² Subsections (2) and (3) of this provision [MCL 418.925(2) and MCL 418.925(3)], not implicated in this case, address the payment and reimbursement procedure applicable to those benefits for which the Fund is liable.

³ The "back rules" preclude a weekly benefit award for periods of time more than one year, or two years, before the filing date of a benefit claim under the circumstances described in those provisions.

123 S Ct 748; 154 L Ed2d 653 (2003), the United States Supreme Court considered whether the Commissioner of Social Security was authorized to make initial assignments of liability for financial responsibility after September 30, 1993 under § 9706(a) of the Coal Industry Retiree Health Benefits Act [26 USC 9706(a)], that provides:

In general. For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

While the Court majority held that the Commissioner was authorized to make the assignments in question after October 1, 1993 because Congress had not specified a consequence for non-compliance with the statutory deadline, 537 US at 159, Justice Scalia dissented. He explained, at 537 US 174-175, that when a legislatively-specified period of time expires, the legislatively-granted power to act within that time expires as well:

The Court holds that the Commissioner retains the power to act after October 1, 1993, because Congress did not "specify a consequence for noncompliance" with the statutory deadline. *Ante*, at 8. This makes no sense. *When a power is conferred for a limited time, the automatic consequence of the expiration of that time is the expiration of the power.* [emphasis added]

At 537 US 175, Justice Scalia offered a compelling example in support of his reasoning:

If a landowner authorizes someone to cut Christmas trees "before December 15," there is no doubt what happens when December 15 passes: The authority to cut terminates. And the situation is not changed when the authorization is combined with a mandate—as when the landowner enters a contract which says that the other party "shall cut all Christmas trees on the property before December 15." Even if time were not of the essence of that contract (as it is of the essence of § 9706(a), for reasons I shall discuss in Part III, *infra*) no one would think that the contractor had continuing authority—not just for a few more days or weeks—but perpetually, to harvest trees.

There is a clear parallel between Justice Scalia's logic in *Barnhart* and the operation of the notice provision in § 925(1). The statutory language at issue in *Barnhart* empowered the Commissioner of Social Security to take certain action by a stated date. From this stated timebar,

Justice Scalia concluded that the commissioner lacked authority to take the action in question after that date. Similarly, § 921 of the WDCA imposes benefit liability upon the Fund *if* the claimant's employer has complied with § 925(1)'s notice provision.

See, also, *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). In *Scarsella*, the issue was whether a medical malpractice plaintiff's complaint had been timely filed where it was filed before the end of the two-year statute of limitations under MCL 600.5805(4)], but without an accompanying affidavit of merit as required by MCL 600.2912d(1). At page 549, this Court quoted from the Court of Appeals analysis, which this Court adopted in its entirety:

We find no error in the trial court's analysis. Generally, a civil action is commenced and the period of limitation is tolled when a complaint is filed. See [citations omitted]. However, medical malpractice plaintiffs must file more than a complaint; they "shall file with the complaint an affidavit of merit" See also [citation omitted] *Use of the word "shall" indicates that an affidavit accompanying the complaint is mandatory and imperative.* [citation omitted]. We therefore conclude that, for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit. [emphasis added; citations omitted]

There is also a parallel between *Scarsella* and this case. Just as a medical malpractice claimant's action is properly filed only when it includes the affidavit required by a statute phrased in terms of the mandatory "shall," an employer's or carrier's request for Fund reimbursement under § 921 is proper only if it was preceded by the notice required by a statute phrased in terms of the mandatory "shall"—§ 925(1). Section 925(1)'s notice provision is thus a legislative limitation on the Fund's reimbursement liability under § 921, and the Fund's reimbursement authority under that section expires if the employer fails to comply with the notice provision, a legislatively-imposed jurisdictional limitation. *Barnhart, supra* (Scalia, J., dissenting), *Scarsella, supra*.

E. **Assuming *arguendo* that § 925(1) is unclear, a textualist approach requires a construction that is compatible with the surrounding body of law into which § 925(1) must be integrated.**

As discussed above, WDCA § 925(1)'s notice requirement includes the word "shall," and thus imposes a legislatively-imposed mandatory duty upon the employer. *Roberts, supra*.

Assuming *arguendo* that the provision is unclear, the proper method by which to understand its meaning is the textualist statutory construction theory. In *Green v Bock Laundry Machine Co*, 490 US 504; 109 S Ct 1981; 104 L Ed 2d 557 (1989), the United States Supreme Court held that the then-prevailing text of FRE 609(a)(1) required the federal trial courts to allow a civil litigant to impeach an adversary's credibility with evidence of the adversary's prior felony convictions.

At 490 US 528, Justice Scalia said in a concurring opinion:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the ***whole*** Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) *most compatible with the surrounding body of law into which the provision must be integrated* -- a compatibility which, by a benign fiction, we assume Congress always has in mind. [boldfaced emphasis Justice Scalia's; other emphasis added]

A textualist approach thus seeks a statutory construction that is "most compatible with the surrounding body of law into which the provision must be integrated. . . ." *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring). The "surrounding body of law into which [§ 925(1)] must be integrated" is the balance of the WDCA.

An examination of that "surrounding body of law" reveals that if § 925(1)'s notice requirement is unclear, it is properly understood to allow no exceptions *because the other three notice provisions in the WDCA expressly do permit non-compliance under stated circumstances*.

WDCA § 381(1) [MCL 418.381(1)] requires any employee seeking WDCA benefits to notify his or her employer within a discrete time period and delineates the circumstance under which non-compliance will be excused. In pertinent part, § 381(1) provides:

The employee shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury. *Failure to give such notice to the employer shall be excused unless the employer can prove that he or she was prejudiced by the failure to provide such notice.* [emphasis added]

Because WDCA § 381(1) expressly states the circumstance under which non-compliance with its notice requirement will be excused, it stands in pointed contrast to WDCA § 925(1)'s notice requirement, *which lacks a description of any circumstance that will excuse non-compliance.*

A second WDCA provision that requires notice and excuses a failure to provide it is § 383 [MCL 418.383], which provides:

A notice of injury or a claim for compensation made under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer or the carrier, was in fact misled. *Want of written notice shall not be a bar to proceedings under this act if it be shown that the employer had notice or knowledge of the injury.* [emphasis added]

Thus, § 383 states the circumstances under which the Legislature has excused a failure to comply with the provision. Section § 925(1)'s notice requirement *lacks a description of any circumstance that excuses non-compliance.*

A third section imposing a notice requirement is WDCA § 835 [MCL 418.835], which authorizes a WDCA claimant and his or her employer to redeem (settle) their differences. WDCA § 835(2) [MCL 418.835(2)] mandates that the carrier notify the employer within a stated time period, while WDCA § 835(3) [MCL 418.835(3)] authorizes a waiver of that notice under stated circumstances. WDCA § 835(2) and (3) provide, in pertinent part:

The carrier shall notify the employer in writing of the proposed redemption agreement not less than 10 business days before a hearing on the proposed redemption agreement is held. The notice shall include all of the following:

....

The worker's compensation magistrate may waive the requirements of subsection (2) if the carrier provides evidence that a good faith effort has been made to provide the required notice or if the employer has consented in writing to the proposed redemption. [emphasis added]

Section 925(1) *lacks a description of any circumstance that excuses non-compliance*, and thus sharply contrasts with WDCA §§ 381(1), 383 and 835(2) and (3). While WDCA § 925(1) states no circumstances under which a carrier's or employer's non-compliance with the provision will be excused, WDCA §§ 381(1), 383 and 835(2) and (3) expressly excuse non-compliance under stated circumstances. Therefore, in light of the "surrounding body of law into which the provision must be integrated," if § 925(1) is unclear this Court must find that the Legislature did not intend to excuse non-compliance with WDCA § 925(1)'s notice requirement for any reason.

Section 931(4) [MCL 418.931(4)] of the WDCA offers additional support for this conclusion. WDCA § 931(4) provides:

At the time of the hearing, the employer and the fund may appear, cross-examine witnesses, give evidence, and defend both on the issue of liability of the employer to the employee and on the issue of the liability of the fund. [emphasis added]

The Fund is authorized to defend the issue of its liability, to present witnesses and evidence, and to cross-examine opposing witnesses on the question. One statutory defense available to the Fund is that the employer's conduct has invalidated the certification. The last sentence of § 905 of the WDCA [MCL 418.905] provides that "[a] certificate is not valid with an employer by whom the person has been employed within 52 weeks before issuance of the certificate." Thus, if an employer has employed the employee at any time within the 52 weeks prior to certification, the employer's conduct invalidates the certificate. There would have been

little reason for the Legislature to have expressly authorized the Fund to present a defense on the issue of its liability if the Fund could not avail itself of the defense described in § 905, and in *Brown v Michigan Health Care Corp*, 463 Mich 368, 376; 617 NW2d 301 (2000), this Court recognized the Fund's authority to assert that defense.

Similarly, there would have been little reason for the Legislature to have authorized the Fund to defend on the issue of its liability if the Fund could not avail itself of the defense stated in § 925(1)—the notice requirement. *Brown, supra*, suggests the logical parallel; just as *Brown* recognized the Fund's authority to oppose a claim against it on the ground stated in § 905, this Court should recognize the Fund's authority to oppose a claim against it on the ground stated in § 925(1)—the notice requirement—where an employer seeks to impose benefit liability upon the Fund beyond the 52-week period set forth in § 921.

While neither *Robinson* nor *Valencic* construed WDCA §§ 921 and 925(1) as a legal *quid pro quo*, the analysis is apposite. In *Johnson v Transportation Agency*, 480 US 616; 107 S Ct 1442; 94 L Ed 2d 615 (1987), Justice Scalia, dissenting, explained at 480 US 671 that statutory enactments are properly considered not in isolation but "as part of a total legislative package containing many *quids pro quo*." As noted above, §§ 921 and 925(1) were added to the WDCA at the same time, by 1971 PA 183. Thus, § 925(1) is the *quid* that an employer must tender in order to obtain the *quo* of Fund benefit liability to the certified person beyond the 52-week period stated in § 921. Oakwood's request to apply § 921 notwithstanding its failure to comply with § 925(1) must be rejected for this reason as well.

F. Section 925(1)'s imposition of the duty to notify upon carrier, rather than employer, does not affect the construction of that section or of § 921 in this case.

In the order granting leave to appeal, this Court asked the parties to address whether the analysis of the respective rights and liabilities of Oakwood and of the Fund are affected by the

fact that § 925(1) imposes the duty to notify the Fund upon the carrier rather than upon the certified person's employer. [44a] The Fund's answer to this question is "no," based upon an analysis of the text of §§ 925(1), 601, 611, and 621(4) of the WDCA; MCL §§ 418.925(1), 418.601, 418.611, 418.621(4).

1. Text of relevant statutory provisions.

The second sentence of § 925(1), which imposes the mandatory notice requirement, provides:

Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, *the carrier shall notify the fund* whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury. [emphasis added]

The provision thus places the duty to notify the Fund upon the "carrier." Section 601 of the WDCA [MCL 418.601] defines "carrier" for WDCA purposes as follows:

Whenever used in this act:

- (a) "Insurer" means an organization that transacts the business of worker's compensation insurance within this state.
- (b) "Self-insurer" means either of the following:
 - (i) An individual employer authorized to carry its own risk.
 - (ii) A group of employers who pool their liabilities under this act as a group fund in the manner provided in section 611.
- (c) "Carrier" means a self-insurer or an insurer.

Section 601 of the WDCA thus defines "carrier" as either a self-insured employer or as an insurance company, *i.e.*, a company that issues workers' compensation insurance policies. The section additionally defines "self-insurer" as an employer permitted to self-insure or, alternatively, as a group of employers that pool their WDCA liabilities, commonly known as a group fund.

Section 611(1) [MCL 418.611(1)] of the WDCA requires every employer subject to the WDCA to secure its liability for the payment of compensation by either [1] obtaining approval to

self-insure, [2] purchasing workers' compensation insurance, or [3] obtaining approval to join a group fund.

2. Analysis.

As noted, §§ 601 and 611(1) provide that an employer may secure its WDCA liabilities by one of three methods. As Oakwood has obtained approval to self-insure, brief of appellant at 11, the employer and the carrier in this case are one and the same party. For that reason, WDCA § 925(1)'s imposition of the notice requirement upon the carrier is of no legal moment.

G. Effect of employer's non-compliance with § 925(1): *Robinson and Valencic*.

In *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), the Court of Appeals addressed the consequence that occurs if an employer fails to comply with the legislative mandate of § 925(1). At page 334, the Court stated the issue presented and noted the paramount rule of statutory construction:

This case concerns the consequences of an employer's failure to give notice to the fund during the time prescribed by subsection 925(1) of the Worker's Disability Compensation Act where that provision is silent with regard to the matter of consequences. The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature. *Drouillard v Stroh Brewery Co*, 449 Mich 293, 302; 536 NW2d 530 (1995).

At page 335, the *Robinson* Court noted the legislative use of the word "shall" contained in § 925(1)'s notice requirement and reasoned that the word "shall" imposes a mandatory duty upon a certified person's employer to comply. The Court held that the consequence of an employer's non-compliance with the notice requirement is the Fund's dismissal from the case as a matter of law, thus precluding Fund reimbursement liability to the employer for the claimant's benefits.

Two years after *Robinson*, the Court of Appeals revisited the issue of the consequence of a certified person's employer failing to comply with WDCA § 925(1)'s notice mandate. In

Valencic v TPM, Inc, 248 Mich App 601; 639 NW2d 846 (2002), the Court at page 608 noted the *Robinson* holding that WDCA § 925(1)'s notice requirement is mandatory and that an employer's non-compliance with it forecloses Fund liability. At page 609, the *Valencic* Court held that there are no exceptions to the applicability of WDCA § 925(1)'s notice requirement because the provision's text states no exceptions to its applicability:

MCL 418.925(1) states that when a vocationally disabled person receives an injury, "the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein." *We find nothing in the rest of MCL 418.925(1) that specifically limits the notice requirement* therein to situations where the benefits are voluntarily paid, nor anything in MCL 418.931 that specifically limits its application to situations where there is a dispute concerning the payment of benefits. Therefore, to the extent the WCAC concluded that MCL 418.925(1) was inapplicable to the instant case, it committed an error of law. [emphasis added]

The *Valencic* Court thus reiterated that a certified person's employer must comply with WDCA § 925(1)'s notice requirement in order to impose benefit liability upon the Fund under WDCA § 921. If that employer fails to comply with § 925(1), the Fund must be dismissed as a matter of law.

H. The Court of Appeals properly decided *Robinson* and *Valencic*.

This Court's order granting leave to appeal asks the parties to address the issue of whether the Court of Appeals properly decided *Robinson, supra*, and *Valencic, supra*. [44a] The Fund submits that the cases were correctly decided and offers several bases supporting that answer. The Fund urges this Court to affirm both cases and their holdings.

1. *Robinson* and *Valencic* comport with fundamental rules of statutory construction.

The rules of statutory construction support the Court of Appeals holdings in *Robinson* and *Valencic*. In *Roberts v Mecosta Co General Hospital*, 466 Mich 57; 642 NW2d 663 (2002), this Court discussed the premier rule of statutory construction as follows, at page 63:

An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. . . . A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

The Court described the mandatory nature of the words "shall," "shall not" and "at least" when utilized in statutory law, 466 Mich at 65 – 66:

The phrases "shall" and "shall not" are unambiguous and denote a mandatory, rather than discretionary action. *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). Likewise, the phrase "at least" plainly reflects a minimal requirement and cannot plausibly be considered ambiguous.

In *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999), this Court considered the applicability of § 1651 of the Revised Judicature Act [MCL 600.1651]. That provision allows a case to be tried in a court of improper venue unless the defendant timely moves for venue transfer, in which case "the court shall transfer the action to a proper county on such conditions relative to expense and costs as provided by court rule and section 1653." At pages 318-319, this Court held that RJA § 1651 is unambiguous and is therefore to be enforced as written:

If the language of a statute is clear and unambiguous, judicial construction is not permitted and we enforce the statute as written. The Legislature's use of the word "shall" rather than "may" in MCL 600.1651; MSA 27A.1651 indicates a mandatory, rather than discretionary, action. *The statute contains no exception* for venue in actions founded on a contract that includes a venue selection clause. Therefore, under the plain language of the statute, the trial court must transfer an action brought in an improper venue on the defendant's timely motion, regardless of whether the defendant had contractually agreed to the venue. [emphasis added; citations omitted]

There is a clear parallel between the statute at issue in *Omne Financial* and § 925(1) of the WDCA. Just as the venue statute contains no exception to its applicability, § 925(1) contains

no exception to its applicability. Therefore, just as the venue statute is unambiguous and must be applied as written, § 925(1) is unambiguous and must be applied as written.

More recently, in *Pittsfield Charter Twp v Washtenaw County*, 468 Mich 702, 714; 664 NW2d 193 (2003), this Court reiterated the fundamental rule of statutory construction:

[T]he fundamental rule of [statutory] construction [is] that *every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory* if at all possible. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 364; 459 NW2d 279 (1990). [first bracketed word this Court's; second bracketed word and emphasis added]

This Court's citation in *Pittsfield Charter Twp* to *Feld* is significant as *Feld* addressed the proper construction of WDCA § 385 [MCL 418.385] that authorizes an employer to obtain an independent medical examination of an employee. The principle of according effect to every word of a statute is thus applicable in the workers' compensation context no less than in any other.

The Court of Appeals holdings in *Robinson* and *Valencic* adhere to the principles set forth in *Roberts, supra*, *Omne Financial, supra*, and in *Pittsfield, Twp, supra*. Section 925(1)'s notice requirement requires a certified person's employer to notify the Fund "whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury." The section does not require the opinion to be proven accurate subsequently, but merely requires its tender within a discrete period of time—"not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury." Because the statutory notice directive is plain, it must be enforced as written, *Roberts, supra*.

In holding that the consequence of an employer's failure to comply with § 925(1)'s notice mandate is the Fund's dismissal, the *Robinson* and *Valencic* panels afforded effect to the legislative command that the employer of a certified person "shall" notify the Fund as set forth in

the section. Because the legislative utilization of the word "shall" expresses a mandatory rather than discretionary task, *Roberts, supra*; *Omne Financial, supra*, a certified person's employer is under a legal duty to comply with the statutory mandate. The failure to discharge that duty thus properly results in the Fund's dismissal, *Robinson, supra*; *Valencic, supra*.⁴

2. This Court has previously held dismissal is an appropriate sanction for non-compliance with WDCA provisions even though dismissal is not mentioned in those provisions.

On two occasions this Court has held dismissal to be the consequence of an employer's failure to comply with WDCA sections that do not specify dismissal as a sanction for non-compliance. In *McAvoy v H B Sherman Co*, 401 Mich 419; 258 NW2d 414 (1977), this Court rejected a constitutional attack upon what is now WDCA § 862(1) [MCL 418.862(1)], enacted by 1975 PA 34. While this section mandates an appellant to pay 70% of the ordered weekly benefit until final determination of the appeal, or for any lesser time specified in the benefit award, the provision lacks a sanction for non-compliance. At page 461 this Court held that in order to avoid rendering WDCA § 862(1) of no effect, the sanction for an employer's failure to comply with the provision is the dismissal of its appeal.

McAvoy is not an anomaly. Eighteen years later, in *Garcia v McCord Gasket Corp*, 449 Mich 16; 534 NW2d 473 (1995), this Court considered the consequence that should follow an appellant's failure to comply with WDCA § 862(2) [MCL 418.862(2)]. That provision mandates an appellant to provide awarded medical benefits until final determination of the appeal, or for any lesser time specified in the benefit award, but lacks a sanction for an employer's non-compliance. The *Garcia* Court relied upon the *McAvoy* rationale and held, at pages 26-27, that in

⁴ This result does not mean, however, that the employer's obligation to the employee ends. See brief of intervenor-appellee Director at page 3.

order to avoid rendering WDCA § 862(2) of no effect, the sanction for an employer's failure to comply with the provision is the dismissal of its appeal.

The *Robinson* and *Valencic* holdings—that the Fund's dismissal results from an employer's failure to comply with § 925(1)'s notice mandate—thus comport with both *McAvoy*, *supra*, and *Garcia*, *supra*. As in those cases, the opposite holdings in *Robinson* and *Valencic* would have rendered § 925(1)'s notice requirement of no effect.

In *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002), this Court succinctly reaffirmed its commitment to the rule that every statutory word and clause is to be given effect to the extent it is possible to do so:

When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence.

This Court should therefore reaffirm the holdings of *Robinson* and of *Valencic*, should affirm the opinion below on their authority, and should thereby give effect to § 925(1)'s mandatory notice requirement.

3. The concurring opinion below misapprehends the judicial function.

While the concurring opinion below correctly notes that § 925(1)'s mandatory notice requirement lacks a consequence for non-compliance, the opinion asserts that the *Robinson* Court exercised legislative power:

Despite this lack of any statutory language spelling out the consequences to the Second Injury Fund of an employer's failure to give notice, the *Robinson* panel concluded that there should be *some* consequences because, were there not, "employers would be free to ignore the statutory requirements without fear of adverse consequences." *In my view, the Robinson panel thereby took upon itself the role of a super-legislature, stepping into a breach created by the silence of the statute itself in order to avoid a hypothetically undesirable result.* I do not view this as the proper function of an appellate court; we do not, or ought not, function as black-robed nannies who tidy up the language of the law in the name of "fairness." Similarly, when the *Valencic* panel used the *Robinson* holding to cut off the liability of the Second Injury Fund, it was quite simply inventing a remedy

nowhere provided for in the statute itself. [41a] [boldfaced emphasis the courts, other emphasis added; footnote omitted]

The concurring opinion's criticism is unfounded. In *Robinson*, the Court of Appeals recognized that an issue of statutory construction arose because the WDCA does not address the factual scenario presented in that case. The issue, presented here as well, was and remains that of the proper construction of §§ 921 and 925(1) of the WDCA in the context of an employer's failure to comply with § 925(1)'s notice requirement.

This Court has long recognized statutory construction as an appellate court's duty. In *Pratt v Tefft*, 14 Mich 191, 196 (1866), the Court said:

We must presume that the legislature which adopted the revision of 1846 were not satisfied with the provision as it stood in the section above quoted from the revision of 1838, and that this clause was therefore added for *some* purpose, and intended to have *some* effect; and *it is our duty in construing the statute and interpreting this clause, to ascertain the purpose and intention of the legislature.* [boldfaced emphasis this Court's; other emphasis added]

Thus, for at least 138 years this Court has recognized its duty to construe statutory language in a manner reflecting the legislative intent underlying that language. United States Chief Justice John Marshall's legendary analysis of the judicial role in *Marbury v Madison*, 5 US 137, 177; 1 Cranch 137; 2 L Ed 60 (1803), is particularly apposite:

It is emphatically the province and duty of the judicial department to say what the law is. *Those who apply the rule to particular cases, must of necessity expound and interpret that rule.* [emphasis added]

This Court agrees. In *Charles Reinhart Co v Winiemko*, 444 Mich 579, 592 n 24; 513 NW2d 773 (1994), the Court reproduced the above-quoted language from *Marbury, supra*, and succinctly observed:

While Chief Justice Marshall was addressing the federal judiciary, that the powers of Michigan's judiciary in this regard are modeled after the federal judiciary is not questioned.

The concurring opinion below thus plainly errs in criticizing the *Robinson* Court's construction of § 925(1) as the action of a "super-legislature." In *Robinson* the Court of Appeals faced an issue of statutory construction and addressed it, thereby discharging an appellate court's undisputed duty to "expound and interpret" the rules of law as legislatively declared, and "to say what the law is," *Marbury, supra*. Disagreement with the *Robinson* holding does not convert *Robinson* into an improper exercise of legislative power.

As noted, the *Robinson* Court held at page 335 that the Fund's dismissal is necessarily implied from non-compliance with WDCA § 925(1)'s notice requirement because "[w]ere it not, employers would be free to ignore the statutory requirements without fear of consequences," *i.e.*, the denial of Fund reimbursement. This Court has utilized the same analytical approach in construing the WDCA. In *Sweatt v Dep't of Corrections*, 468 Mich 172, 181-182; 661 NW2d 201 (2003), the issue was that of the proper construction of the last sentence of § 361(1) of the WDCA [MCL 418.361(1)]. The sentence relieves employers of liability for WDCA benefits for time periods an employee "is unable to obtain or perform work because of imprisonment or commission of a crime." At pages 181-182, the majority rejected the dissenting opinion's analysis that would have limited the quoted language's applicability to only unemployed persons because "if that were the case, this exception would never apply to *any* partially disabled employees, and thus it would be rendered nugatory with regard to these employees." (emphasis this Court's)

This Court has utilized the same analytical approach when construing statutes other than the WDCA. For example, in *Nawrocki v Macomb County Rd Comm*, 463 Mich 143, 182 n 36; 615 NW2d 702 (2000), the majority concluded that the dissenting opinion's proposed construction incorporating language in the Motor Vehicle Code "would render the fourth

sentence of the Governmental Immunity Act's 'highway exception' (MCL 691.1402(1)) meaningless." Thus, the concurring opinion's criticism of *Robinson*'s decisional rationale as an invasion of the Legislature's prerogative is unpersuasive.

I. Absence of statutory sanction for non-compliance with § 925(1)'s notice requirement does not affect validity of *Robinson* and *Valencic*.

This Court's order granting leave to appeal asks the parties to address the issue of whether the lack of a statutory remedy for non-compliance with WDCA § 925(1)'s notice requirement affects the validity of the *Robinson* and *Valencic* holdings. [44a] A review of Michigan statutory and decisional law, both within and beyond the WDCA, compels the conclusion that WDCA § 925(1)'s notice requirement as mandatory and enforceable notwithstanding the provision's lack of an express remedy for non-compliance.

1. Workers' compensation law.

Two WDCA provisions impose mandatory responsibilities but lack consequences for non-compliance. As discussed above, § 862(1) obligates a carrier to pay 70% of the ordered weekly benefit pending an appeal of the award. That section additionally requires the Fund to reimburse the carrier to the extent that the carrier's payment of so-called "70% benefits" exceeds the amount finally determined to be due, via the following sentence:

If the weekly benefit is reduced or rescinded by a final determination, the carrier shall be entitled to reimbursement in a sum equal to the compensation paid pending the appeal in excess of the amount finally determined. *Reimbursement shall be paid upon audit and proper voucher from the second injury fund established in chapter 5 [MCL 418.501 et seq.]* [bracketed matter and emphasis added]

The provision contains no sanction should the Fund fail to comply with the emphasized language. However, in *McAvoy, supra*, at page 446, this Court reaffirmed the Fund's obligation to reimburse a carrier when that party's appeal of a benefit award results in a reduction or rescission of benefits:

The clear wording of the statute provides that reimbursement for benefits paid during the pendency of an appeal, which subsequently reduces or rescinds those benefits, "shall be paid * * * from the second injury fund". The word "shall" clearly means that payment is mandatory or imperative from the fund. *Southfield Twp v Drainage Board for 12 Towns Relief Drains*, 357 Mich 59; 97 NW2d 821 (1959).

Because § 862(1) contains no sanction, is it Oakwood's position that "no sanction, no consequence" would enable the Fund to completely sidestep its statutory reimbursement liability without consequence? The Fund doubts that Oakwood would countenance this result and suggests that a "no sanction, no consequence" result would call into question the *McAvoy* Court's ruling to the contrary.

A second provision, § 827(1) [MCL 418.827(1)], authorizes an injured employee, the employee's dependent(s) or personal representative, or the employer or its carrier, to maintain a tort action for damages against a third-party tortfeasor responsible for the employee's injury or death. Subsection (5) of WDCA § 827 [MCL 418.827(5)] authorizes the employer or carrier to obtain reimbursement for benefits paid or payable under the WDCA, and imposes the reimbursement obligation via the mandatory word "shall." In pertinent part, § 827(5) provides:

Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, *shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery* and the balance shall immediately be paid to the employee or his or her dependents or personal representative [emphasis added]

While the above section contains no sanction for non-compliance, in *Transamerican Freight Lines, Inc v Quimby*, 381 Mich 149, 159; 160 NW2d 865 (1968), this Court emphasized the primacy of the reimbursement obligation:

Paragraphs 1 [§ 827(1) (MCL 418.827(1))] and 5 of the statute above quoted *establish the right* to bring an action, the recovery *and reimbursement*. Paragraph 1 provides that both employer and employee may become party plaintiff, and *paragraph 5 states* that the action may be brought to recover any damages "for which the employee or his dependents or personal representatives will be entitled

to recover in an action for tort" and that "any recovery" for damages resulting "from personal injury or death only, ***after deduction of expenses for recovery, shall*** first reimburse the employer or its workmen's compensation insurance carrier." [boldfaced emphasis this Court's; italicized emphasis and bracketed matter added]⁵

Is Oakwood suggesting that a "no sanction, no consequence" rule should allow a successful third-party plaintiff to avoid that party's reimbursement obligation under § 827(5)? The Fund doubts that Oakwood would accept that result and suggests, again, that such a result would call into question the holding in *Transamerican* as well. This Court should therefore reject Oakwood's contention and avoid the legal uncertainty that acceptance of Oakwood's position would engender.

2. Other Michigan statutes.

As noted, WDCA § 925(1)'s notice requirement states no circumstance that will excuse a carrier's non-compliance. The provision is properly construed as mandatory and enforceable in light of the text of other Michigan statutory notice provisions describing circumstances that will excuse non-compliance. For example, MCL 205.209e, pertaining to the taxation of inheritances, provides:

Except as otherwise provided in this act, a safe and collateral deposit company, trust company, corporation, bank, or other institution, or person having in possession or custody, securities, deposits, or any other assets subject to tax under this act at the death of a decedent who was a resident of this state, which become payable other than to the decedent's executors or administrators upon the death or by reason of the death of the resident decedent, shall not make payment, delivery, or surrender custody thereof *unless notice* as prescribed by the

⁵ This Court's opinion in *Piper v Pettibone Corp*, 450 Mich 565; 542 NW2d 269 (1995), illustrates the primacy of the lien that WDCA § 827(5) creates. In that case, the amount of the employer's lien exceeded the amount of the plaintiffs' net recovery after deduction and expenses. This Court said at page 571 that arguments concerning the statutory fairness are properly presented to the Legislature, and held at page 572 that the language of WDCA § 827(5) entitled the employer to obtain the entire net recovery involved. Thus, Oakwood's arguments concerning the results of WDCA § 925(1)'s application, appellant's brief at pages 14-18, fail.

department of treasury, of the time and place of the intended payment, delivery, or surrender *is served upon the department of treasury at least 15 days prior thereto. The notice and 15-day period may be waived by the department of treasury.* [emphasis added]

MCL 205.209e permits the Department of Treasury to excuse non-compliance with the notice requirement in the section. As noted, WDCA § 925(1) states no circumstance that will excuse non-compliance with its notice requirement.

MCL 205.234, also pertaining to the taxation of inheritances, provides:

The personal representative, within 2 months after the decedent's death, or within 2 months after qualifying as the personal representative, whichever is later, shall give written notice that he or she is the personal representative to the department on a form prescribed by the department. However, the department may waive the filing of this notice.

This provision thus allows the Department of Treasury to waive compliance with the statutory notice requirement. As noted, WDCA § 925(1) states no circumstance that will excuse non-compliance with its notice requirement may.

Another statute imposing a notice requirement and authorizing a governmental agency to waive compliance is § 11709(2) [MCL 324.11709(2)] of the Natural Resources and Environmental Protection Act, which provides:

An applicant for a permit [to dispose of certain waste on land] under subsection (1) [MCL 324.11709(1)] shall send a notice to each land owner who owns property located within 800 feet of the proposed disposal location on a form approved by the department [of Agriculture]. Service of the notice shall be made by first-class mail. The notification shall include the nature of the proposed land use, the location of the proposed disposal area, and whom to contact if there is an objection to the proposed land use. A copy of the notice that is mailed to each property owner shall be sent to the certified health department having jurisdiction. If no substantiated objections as determined by the department are received within 10 business days following the mailing of the notification, the department may issue a permit as provided in this section. *If the department finds that the applicant is unable to provide notice as required in this subsection, the department may waive the notice requirement or allow the applicant to use a substitute means of providing notice.* [emphasis and bracketed matter added]

The Legislature has thus authorized the Department of Agriculture to waive compliance with the above statutory notice obligation. Section 925(1) of the WDCA is markedly different as it states no circumstance that will excuse non-compliance with its notice requirement.

In each of the provisions discussed above, the Legislature stated its intent to excuse non-compliance with an otherwise-mandatory notice requirement under expressly-stated circumstances. In contrast, § 925(1) of the WDCA has no language describing any circumstances that excuse non-compliance with its notice requirement. This fundamental distinction between the text of § 925(1) and the text of the provisions discussed above compels the conclusion that § 925(1)'s notice requirement is enforceable notwithstanding its lack of a sanction for non-compliance.

3. Other Michigan decisional law holds that the Legislature's use of word "shall" imposes a mandatory duty and results in consequences for non-compliance.

Oakwood's "no sanction, no consequence" calls into question this State's decisional law holding that the legislative use of the word "shall" imposes a mandatory duty and requires sanctions for non-compliance. Section 9(2) [MCL 38.559(2)] of the Fire Fighters and Police Officers Retirement Act provides, in pertinent part:

For the purpose of creating and maintaining a fund for the payment of the pensions . . . the municipality . . . *shall appropriate. . . an amount sufficient to maintain actuarially determined reserves covering pensions payable or that might be payable on account of service performed and to be performed by active members*, and pensions being paid to retired members and beneficiaries.
[emphasis added]

In *Shelby Twp Police & Fire Retirement Bd v Shelby Twp*, 438 Mich 247, 261-264; 475 NW2d 249 (1991), this Court held that the word "shall" in the quoted provision imposes a mandatory duty:

The board argues that the language of 1937 PA 345 ("shall") obligates the township to appropriate funds to cover pensions earned by active members for services to be performed in the current year and earned by active members for services performed. By using "shall," the Legislature necessarily intended a mandatory obligation. *Transamerican Freight Lines, Inc v Quimby*, 381 Mich 149, 158; 160 NW2d 865 (1968). *We agree. . . .*

The township is, however, compelled by statute, [citation to provision quoted above omitted], to maintain the actuarial integrity of the pension system by funding current service costs as well as unfunded accrued liability and benefits due retirees. [emphasis added; footnote omitted]

As MCL 38.559(2) contains no sanction, Oakwood's "no sanction, no consequence" position would enable any municipality to ignore its statutory duty to fund its pension plan as set forth in that provision and thereby cast doubt upon this Court's holding in *Shelby Twp Police & Fire Retirement Bd, supra*, as well.⁶

Section 3020(6) [MCL 500.3020(6)] of the Insurance Code provides:

A notice of cancellation, including a cancellation notice under section 3224, shall be accompanied by a statement that the insured shall not operate or permit the operation of the vehicle to which notice of cancellation is applicable, or operate any other vehicle, unless the vehicle is insured as required by law.

This provision obligates an automobile insurer wishing to cancel an insurance policy to advise its insured that (s)he shall neither operate nor permit the operation of an uninsured motor vehicle. In *Depyper v Safeco Ins Co*, 232 Mich App 433, 442-443; 592 NW2d 344 (1998), the Court of Appeals held that the failure of the defendant-insurer to provide the statutorily-required notice rendered a purported cancellation ineffective, even though the statute provided for no such sanction, and remanded the case for entry of judgment against the insurer. The opinion

⁶ While this Court in *Shelby Twp Police* denied a writ of mandamus, the Court did so because the township was under no clear legal duty to utilize the actuarial method employed by the plaintiff-retirement board. *Shelby Twp Police, supra*, at page 264.

demonstrates that consequences flow from an insurer's failure to comply with a statutory mandate, even if the statute does not state them.

This Court should reject the contention that § 925(1) may be ignored without consequence. Acceptance of that proposition would cast significant doubt upon myriad decisions of this Court holding that, in a variety of circumstances, non-compliance with a statutory mandate will result in consequences that will be crafted by the court if necessary.

J. Oakwood's remaining contentions lack merit.

1. The "absurd result" analysis has been rejected in Michigan.

Oakwood has hypothesized that if notice is given to the Fund on the 151st day before and on the 89th day before expiration of the 52-week period, it would be an "absurd result" to dismiss the Fund in such cases, brief of appellant at pages 12-14. Oakwood's contention fails for two reasons.

First, this Court has emphatically rejected the "absurd result" method of statutory construction. In *People v McIntire*, 461 Mich 147, 155-156 n 2; 599 NW2d 102 (1999), this Court said that the "absurd result" rule of statutory construction is

[N]othing but an invitation to judicial lawmaking. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21.

Second, this Court has previously rejected the "absurd result" method of construing the WDCA provisions pertaining to the Fund. See *Gilbert v Second Injury Fund*, 463 Mich 866, 867; 616 NW2d 161 (2000) (reversing Court of Appeals "absurd result" construction of § 372 [MCL 418.372] of the WDCA in *Gilbert v Second Injury Fund*, 237 Mich App 101; 616 NW2d 161 (2000), and remanding for reconsideration in light of *People v McIntire*, *supra*, and two other opinions).

2. Prejudice to employer or to Fund is of no legal moment.

Oakwood has also asserted that it has been prejudiced by the holding of the Court of Appeals, below, brief of appellant at page 15. First, of course Oakwood has been prejudiced, as prejudice is the entire *raison d'être* of a sanction. Second, this Court should not consider Oakwood's argument, as discussed above, because § 925(1) does not provide prejudice as an excuse for non-compliance with that section's notice requirement. By contrast, two WDCA provisions do expressly state prejudice as a factor to be considered in determining the applicability of those sections. See §§ 381(1), discussed *supra*, and 864(4) [MCL 418.864(4)].

Thus, §§ 381(1) and 864(4) of the WDCA allow the effect of prejudice to be considered in determining the applicability of those provisions. Because prejudice is not mentioned in §§ 921 and 925(1) of the WDCA, any existing prejudice is simply of no legal moment in the proper construction of those provisions.

3. WDCA §§ 833(1) [MCL 418.833(1)] and 381(2) [MCL 418.382(2)] do not contribute to the proper construction of §§ 921 and 925(1) of the WDCA.

Oakwood has also argued that the Fund's reimbursement liability may be limited by § 833(1) and/or by § 381(2) [MCL 418.833(1) and MCL 418.381(2), respectively] of the WDCA, brief of appellant at page 16. These provisions are commonly known as the "one year back rule" and "two year back rule," respectively. As each section limits the time period antedating the filing date of a petition for hearing for which an *employee* may be awarded compensation, they are of no import here.⁷

⁷ The "one year back rule" [MCL 418.833(1)] provides that "[i]f payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application." The "two year back rule" [MCL 418.381(2)] provides that "Except as provided in subsection (3) [MCL 418.381(3), pertaining to nursing and attendant care], if any compensation is sought under this act, payment shall not be

K. Contention of *amicus curiae* must be rejected.

Amicus curiae Munson Hospital has argued that the only failure for which an employer may be sanctioned under Chapter 9 of the WDCA is found in § 911. See brief of *amicus curiae* at pages 13-16. Section 911 of the WDCA provides:

Upon commencement of employment of a certified vocationally disabled person the employer shall submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency. The certifying agency shall acknowledge receipt of the information. Failure to file the required information with the certifying agency within 60 days after the first day of the vocationally disabled person's employment precludes the employer from the protection and benefits of this chapter unless such information is filed before an injury for which benefits are payable under this act.

The argument of the *amicus curiae* is based upon the unstated contention that because § 911 states a consequence for non-compliance with the duty therein imposed, while § 925(1) lacks a consequence for non-compliance with the notice requirement therein imposed, non-compliance with § 925(1) can result in no consequence. While the argument may appear superficially attractive, it yields to a textualism analysis which, as discussed above, seeks a statutory construction that is "most compatible with the surrounding body of law into which the provision must be integrated," *Green, supra* (Scalia, J., concurring). Because the brief of *amicus curiae* offers no such analysis, and because § 911 is not a notice provision, the argument of *amicus curiae* Munson Hospital is not persuasive.

CONCLUSION

The Court of Appeals opinion below should be affirmed. *Robinson, supra*, and *Valencic, supra*, were both correctly decided. While WDCA § 925(1) lacks a sanction for non-compliance, this Court has twice held that non-compliance with two other WDCA sections results in

made for any period of time earlier than 2 years immediately preceding the date on which the employee filed an application for a hearing with the bureau." The sections apply to the benefit claims of *employees*.

dismissal notwithstanding the absence of any sanction within the four corners of those provisions. This Court's decisions in those cases were based upon the need to avoid rendering the statutory language in question nugatory. *Robinson* relied upon similar reasoning, and this Court has done so as well in the WDCA context, *Sweatt, supra*.

Both *Robinson* and *Valencic* comport with fundamental rules of statutory construction. Every word in a statute is to be given effect, if possible, and the word "shall" in statutory language reflects a mandatory rather than discretionary action. WDCA § 925(1)'s notice requirement requires a carrier to notify the Fund within a discrete period of time, and is plain and must therefore be enforced as written.

Section 925(1)'s notice requirement is a legislative limitation upon the Fund's authority under § 921 to reimburse employers and carriers for their weekly benefit payments beyond the 52-week period stated in § 921, as the Fund's reimbursement authority expires if the employer or carrier fails to comply with § 925(1). *Barnhart, supra* (Scalia, J., dissenting).

If the Court finds § 925(1) to be unclear, textualism reveals its meaning. Textualism seeks a statutory construction that is "most compatible with the surrounding body of law into which the provision must be integrated," *Green, supra*, at 490 US 528 [Scalia, J., concurring]. The "surrounding body of law into which [WDCA § 925(1)] must be integrated" is the WDCA, which includes § 931(4). That provision authorizes the Fund to raise defenses to claims against it. It would have been idle for the Legislature to so authorize the Fund if the Fund could not assert the notice defense stated in § 925(1).

The concurring opinion below, as well as Oakwood and *amicus curiae* Munson Hospital, in effect rewrite § 925(1) to the extent that they construe the word "shall" contained in § 925(1) as "may." This Court should not do so, and should reject Oakwood's "no sanction, no

consequence" argument. Section 925(1)'s notice requirement lacks a sanction, but must be construed as mandatory in light of not only the text of three other WDCA notice provisions that excuse non-compliance under stated circumstances, but also in light of the text of several other Michigan statutes that impose a notice requirement and excuse non-compliance under stated circumstances.

Oakwood's "no sanction, no consequence" argument fails in light of the myriad decisions of this Court holding that the statutory word "shall" imposes a mandatory duty and requires a sanction for non-compliance. This Court should therefore reject that argument, a conclusion unaffected by the imposition of the notice requirement in WDCA § 925(1) upon the carrier rather than upon the employer. Oakwood is self-insured, and is thus its own "carrier."

If it is to be this State's policy to excuse non-compliance with § 925(1), the decision to implement that policy is for the Legislature alone. In *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004), this Court considered the proper construction of MCL 600.2169(1)(a), which addresses the qualifications of expert witnesses in medical malpractice actions. At page 579 the Court stated:

There is no exception to the requirements of the statute and neither the Court of Appeals nor this Court has any authority to impose one. As we have invariably stated, the argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court. [emphasis added]

There is no exception to § 925(1)'s notice requirement, and this Court lacks the authority to impose one, *Halloran, supra*. The Fund therefore urges this Court to hold that the Court of Appeals correctly decided both *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), and *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2002), and to affirm the Court of Appeals opinion, below.

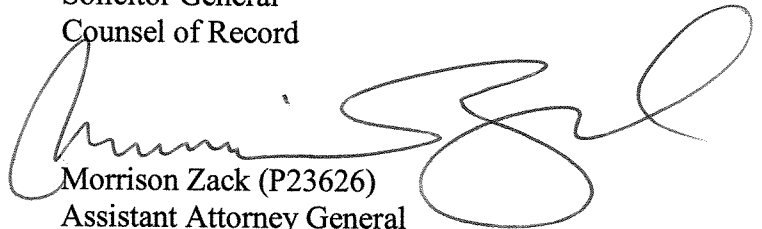
RELIEF

Defendant-appellee Second Injury Fund asks the Court to hold that the Court of Appeals correctly decided both *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), and *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2002), and to affirm the Court of Appeals opinion, below.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Morrison Zack', is written over the printed name and title of Morrison Zack.

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